NO. 47157-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NGA NGOEUNG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 94-1-03719-8

BRIEF OF RESPONDENT

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2. Has defendant failed to show facial constitutional invalidity of certain provisions of RCW 10.95.030(3) on the grounds that it violates defendant's right to a jury trial under the Sixth Amendment?

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4. Should this court uphold the order setting minimum term as the hearing below comported with the requirements of RCW 10.95.030, ***Miller v. Alabama***, and minimal due process?

5. Has defendant failed to show that the trial court abused its discretion in setting the minimum terms on defendant's two aggravated murder convictions at life when the record shows the trial court properly understood the law applicable to the hearing, had thoroughly read all mitigation and other information submitted

to it for consideration and took into consideration the factors set forth in ***Miller*** and RCW 10.95.030(b)?

6. Do the provisions of RCW 10.95.030(a)(ii) unambiguously establish a permissible range for setting a minimum term for a juvenile who commits aggravated murder between the ages of sixteen and eighteen without establishing a "presumptive" minimum term?

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12. Should defendant's personal restraint petition be dismissed because he has failed to show that his restraint is unlawful?

B. STATEMENT OF THE CASE.

In 1994, a jury found defendant Nga Ngoeung guilty of two counts of aggravated first degree murder, two counts of assault in the first degree and one count of taking a motor vehicle without permission. CP 17-27. The offense occurred on August 25, 1994, 51 days before defendant's eighteenth birthday. CP 51-57. Defendant was sentenced to consecutive terms of life without the possibility of parole (LWOP) for the aggravated murders, 136 months and 123 months respectively on the two assault counts (consecutive to each other and the LWOP sentences and 8 months on the motor vehicle offense. CP 17-27.

On August 8, 2014, the superior court had a preliminary hearing with defendant's counsel and the prosecutor regarding a hearing to set a minimum term on each of defendant's convictions for aggravated murder as required by RCW 10.95.035; the court set the date for such a hearing for November 14, 2014, but this was continued until January 23, 2015.

1RP 1-5; 2RP 10-12.[1] This newly enacted statute, RCW 10.95.035, was in response to ***Miller v. Alabama***, —— U.S. ——, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which held the imposition of a *mandatory* LWOP sentence on a juvenile convicted of murder violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See* Laws of 2014, ch. 130, §9 (effective 6/1/2014).

At the hearing to set minimum term, the court indicated that it has read all of the materials submitted to it. There was an initial argument as to whether the minimum terms on defendant's two convictions for aggravated murder would run concurrent or consecutively. 3RP 4-27. The court concluded that under the relevant statutes, the terms would run consecutively and that this would not violate ***Miller***. 3RP 27-33. After considering the written materials submitted and hearing the argument of counsel as to the setting of the minimum term, the court set a minimum term of life on each count of aggravated murder. 3RP 51-56; CP 84-88.

Defendant filed a timely notice of appeal. CP 89-94.

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[1] The State will use the same designations for the verbatim report of proceedings as used by the Appellant. *See* Appellant's Brief at p. 4, n.1.

2. Facts[2] of underlying crime

On August 24, 1994, four high school boys drove down a Tacoma street throwing eggs at houses. One or two eggs were thrown at a house which turned out to be a hangout for a local gang members. As the boys drove away from the house and toward their home, they noticed that they were being followed. The car in pursuit had its high beams on and was following closely. The boys tried to evade the pursuers, but the car kept up. The boys heard gunfire and ducked down in their seats. The pursuing car pulled up beside the boys' car, matching its speed. A second shot shattered the car window. More shots were fired and the driver of the car was hit. The boys' car drifted up the embankment and came to a stop. The other three boys ran from the car to local houses, but one of them fell to ground on the way, mortally wounded. The remaining two boys reached help, but their friends were dead before an ambulance arrived.

The subsequent investigation identified the three occupants of the pursuing car: Oloth Insyxiengmay ("O.I."), Nga Ngoeung ("defendant"), and Southanom Misaengsay ("S.M.") all of whom were under 18 years of age. All three had been outside the house when it was egged. When he saw the egging, O.I. ran into the house and returned with a rifle. O.I. said

[2] As set forth in the unpublished decision of the Court of Appeals on direct review. CP 268-295.

something to the effect of "let's go get 'em" or "I'm going to get them." Defendant heard him make this statement. O.I opened the car door for S.M. and told him to get in. Defendant took the driver's seat and drove off after the boys. S.M. testified that it was O.I. who put the rifle out the window and fired at the boys' car.

The three returned to the gang house and O.I gave the rifle to an occupant to dispose of it. He stated: "we shot them up. We shot them up. They threw eggs at us, the Rickets. We shot them up."

When arrested, O.I admitted being in the car at the time of the incident but denied being the shooter, naming a fourth person. When defendant was arrested he admitted driving the car at the time of the incident, but gave a false name as to whom the shooter was. When S. M was arrested he initially identified a fourth person as the shooter but later identified O.I. as the shooter. S.M. entered an agreement with the prosecution, agreeing to plead guilty and to testify in exchange for his case being kept in juvenile court.

At defendant's trial, evidence was admitted to show that he had participated in a prior drive-by shooting as relevant to show his knowledge of the intent of O.I. to fire the shots at the boys' car. In the prior incident, defendant drove a car that was involved in a shootout with another car and defendant had pulled up beside the other car, then his passenger fired into

the other car. Evidence was also introduce of defendant's and O.I.'s gang involvement as relevant to proof of motive. The State's theory was that the shooting was a response to an apparent "dissing" or disrespect of gang territory.

C. ARGUMENT.

1. THE PROPER METHOD OF SEEKING REVIEW OF AN ORDER SETTING MINIMUM TERM THAT WAS ENTERED PURSUANT TO RCW 10.95.035 IS BY FILING A PERSONAL RESTRAINT PETITION.

When the Legislature enacted the ***Miller*** fix it directed that persons sentenced prior to June 1, 2014, to a term of life without the possibility of parole for an aggravated murder committed when they were under the age of eighteen should be brought back before the sentencing court for a hearing consistent with RCW 10.95.030[3]. RCW 10.95.035[4]. The Legislature also enacted a provision stating the "court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986." RCW 10.95.035. Prior to July 1, 1986, review of a parole board[5] decisions setting a minimum term was obtained by filing a personal restraint petition. ***In re Personal***

[3] Full text of the statute can be found attached as Appendix A.
[4] Full text of the statute can be found attached as Appendix B.
[5] After July 1, 1986 the trial court, rather than the parole board, had the responsibility of fixing minimum terms for offenses committed before July 1, 1984. RCW 9.95.011. However, the court's minimum term decision was subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986. *Id.*

Restraint of Rolston, 46 Wn. App. 622, 623, 732 P.2d 166 (1987). Thus, the proper procedure to obtain review of a trial court decision fixing a minimum term of incarceration pursuant to RCW 10.95 035 is to file a personal restraint petition.

In ***Rolston***, the appellate court opted to disregard the fact that Rolston had improperly sought review by filing a notice of appeal rather than filing a personal restraint petition and, in order to facilitate review on the merits, simply treated the matter as a personal restraint petition. *Id.* at 623. The State will presume that as this case brings before the court issues of first impression including challenges to the constitutionality of the *Miller* fix, that this court, like the one in ***Rolston***, will waive the procedural defect, treat the matter as a personal restraint petition, and address the challenge to the setting of the minimum term on the merits. Nevertheless, the Legislature has specifically indicated the manner of review of such orders and, this provision should not be ignored.

To obtain relief, Ngeoung must show that he is restrained under RAP 16.4(b) and that his restraint is unlawful under RAP 16.4(c). *See* ***In re Personal Restraint of Isadore***, 151 Wn.2d 294, 298–300, 88 P.3d 390 (2004) (noting that petitioners who have had no prior opportunity for judicial review are relieved of the heightened standards of review generally applied in personal restraint petitions); ***In re Personal Restraint of Grantham***, 168 Wn.2d 204, 208, 212–14, 227 P.3d 285 (2010); ***In re***

Personal Restraint of Cashaw, 123 Wn.2d 138, 148–49, 866 P.2d 8 (1994). For the reasons stated below he has failed to make this showing.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING RCW 10.95.030(3) IS UNCONSTITUTIONAL; FURTHER, HE MISCONSTRUES ***ALLEYNE*** AND ITS APPLICABILITY TO THE INSTANT CASE.

An appellate court reviews issues regarding statutory construction de novo. ***State v. J.M.***, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Constitutional challenges are questions of law and are also reviewed de novo. ***City of Redmond v. Moore***, 151 Wn.2d 664, 878, 91 P.3d 875 (2004). Although defendant raised a constitutional challenge to RCW 10.95.030(3) below, it was on a different basis. *See* CP 243-265. He did not challenge the statute below as unconstitutional because it required judicial fact finding in violation of the ***Apprendi/Alleyne***[6] line of cases as he does now on review. *See* Appellant's brief at pp 7-13.

Constitutional challenges to statutes may be either "as applied" or facial. ***City of Redmond***, 151 Wn.2d at 668-69. "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *Id.* A successful "as applied" challenge will invalidate the statute only when it is attempted

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[6] *See* ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and ***Alleyne v. United States***, 570 U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

to be used in similar circumstances, whereas a successful facial challenge is "one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied" rendering the statute "totally inoperative." *Id*

Defendant's argument is that the provisions of RCW 10.95.030(3) violate due process and the Sixth Amendment because it allows a judge to impose increased punishment based upon judicial fact finding rather than what was authorized by the jury's verdicts. *See* Appellant's brief at pp 7-13. This is a facial challenge to the constitutionality RCW 10.95.030(3).

Under the ***Apprendi*** line of cases, any fact that increases the "legally prescribed punishment," regardless of whether that is an increase the minimum term or the maximum punishment, must be found by a jury. *See* ***Apprendi***, 530 U.S. at 490; ***Alleyne***, 133 S. Ct. at 2162. The question "is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," ***Apprendi***, 530 U.S. at 494 (emphasis added), or prevent the sentencer from imposing a lower punishment than is authorized by the jury's guilty verdict, *see* ***Alleyne***, 133 S. Ct. at 2161.

But in ***Apprendi***, the United States Supreme Court expressly indicated that a sentencing court was free to engage in judicial fact finding, by taking into consideration various factors relating both to offense and offender, in determining what sentence should be imposed *within the range* prescribed by statute:

> We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. *See, e.g.*, ***Williams v. New York***, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law" (emphasis added)). As in ***Williams***, our periodic recognition of judges' broad discretion in sentencing-since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, [citation omitted] has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.

Apprendi, 530 U.S. at 481(footnote omitted); *see also* ***United States v. Tucker***, 404 U.S. 443, 447, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972) (agreeing that "[t]he Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review"). This limitation to the extent of ***Apprendi***'s reach has not been modified in subsequent cases. As the Court in ***Alleyne*** reiterated:

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Alleyne, 133 S. Ct. at 2163.

The sentencing provisions of RCW 10.95.030 are triggered by a jury finding a person guilty of premeditated murder in the first degree and the existence of one or more of the statutory aggravating circumstances. RCW 10.95.020. Prior to 2014, there were only two possible sentences for a person who was convicted of aggravated murder in the first degree in Washington: death or life without the possibility of parole. ***State v. Meas***, 118 Wn. App. 297, 306, 75 P.3d 998 (2003). After the United States Supreme Court issued ***Miller v. Alabama***, —— U.S. ——, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012),[7] the Washington Legislature recognized that a *mandatory* imposition of a sentence of life without the possibility of parole ran afoul of ***Miller*** when applied to persons who committed aggravated murder prior to their eighteenth birthday. In response it amended the provisions of RCW 10.95.030 to comport with ***Miller***. Laws of 2014, ch. 130, §9 (effective 6/1/2014). The amendment did not affect the possible sentences for an adult convicted of aggravated murder in the first degree: the options remain either death or life without the possibility of parole. RCW 10.95.030(1) and (2). Under the amended provision, when the aggravated murder was committed by a person who was less than sixteen years of age, the person will be "be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years." RCW 10.95.030(3)(a)(i). These provisions do not

[7] The decision in ***Miller*** has been made fully retroactive. ***Montgomery v. Louisiana***, ___U.S. ___, ___S. Ct. ___, ___ L. Ed. 2d ___, (2016) (2016 WL 280758).

permit any exercise of discretion by the sentencing court. When, however, the person committing the aggravated murder was at least sixteen years of age but less eighteen, the following provisions are pertinent:

> Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.
>
> (b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030(3)(a)(ii) and (b). Under these provisions the court *must* set the maximum term at life, but has discretion to set the minimum term anywhere within the specified range of no less than twenty five years to life. The statute expressly allows for the minimum term to be set at life, but does not require it. While the Legislature has directed the sentencing court to consider various factors in exercising its discretion; the statute does not require any additional factual finding in order to impose a sentence of life without the possibility of parole. A jury's verdicts finding a defendant guilty of aggravated murder provide all the necessary fact finding in order to impose a sentence of life without parole, but the

Legislature has removed the mandatory nature of such a sentence when the person committing the crime is between sixteen and eighteen years of age. According to the express terms of the statute any minimum term set from no less than twenty five years to life is *within the statutory range authorized* by the legislature. As such, the ***Apprendi/Alleyne*** line of cases dealing with the Sixth Amendment right to a jury trial are not implicated.

Defendant has failed to show any constitutional infirmity in RCW 10.95.030. Moreover, as defendant has made a facial challenge, he must show that there is *no* set of circumstances in which the statute, as written, can be constitutionally applied. *See* ***City of Redmond v. Moore***, 151 Wn.2d at 669. Even were this court to accept defendant's arguments regarding the applicability of ***Apprendi/Alleyne*** to RCW 10.95.030(3)(a)(ii) and (b), he could show no constitutional infirmity were the court to impose a minimum term of twenty five years. Defendant's facial challenge to RCW 10.95.030(3)(a)(ii) and (b) is without merit.

Defendant relies upon the case of ***People v. Skinner***, ___N.W. 2d ___ (Mich. Ct. App., 2015)(2015 WL 4945986) in support of his argument that RCW 10.95.030(3)(a)(ii) and (b) conflicts with ***Apprendi*** and ***Alleyne***. In ***Skinner***, a divided three judge panel found that Michigan's legislative fix enacted in the wake of ***Miller*** violated a defendant's Sixth Amendment right to a jury. The dissent, written by Judge Sawyer, found that ***Apprendi*** and ***Alleyne*** were not implicated because the legislative fix required only that the trial court choose a sentence that was within the range authorized

by the statute after considering the ***Miller*** factors. *Id.* Judge Sawyer noted that in determining the sentence, the statute directed that the trial court "shall consider" the ***Miller*** factors, but did not require any specific findings to be made. Recently, a second panel of the Michigan Court of Appeals was faced with the same issue as in ***Skinner***. *See* ***State v. Perkins***, ___ N.W.2d ___ (Mich. Ct. App., 2016)(2016 WL 228364). The court in ***Perkins*** disagreed with ***Skinner***, stating its reasons for concluding that ***Skinner*** was wrongly decided, thereby declaring a conflict with that decision under Michigan's appellate rules. *Id.* Thus, of the six judges on the Michigan Court of Appeals that have examine this issue, only two have agreed with arguments that are similar to the ones advanced by defendant in this case.

For the reasons stated above, defendant has failed to show that RCW 10.95.030(3)(a)(ii) and (b) are facially invalid under the Sixth Amendment.

3. THE ORDER SETTING MINIMUM TERM SHOULD BE UPHELD AS THE COURT PROPERLY EXERCISED ITS DISCRETION IN A HEARING THAT COMPORTED WITH THE REQUIREMENTS OF RCW 10.95.030, ***MILLER***, AND THE MINIMAL DUE PROCESS STANDARDS APPLICABLE TO THE SETTING OF MINIMUM TERMS.

It is well settled in Washington that the setting of a minimum term is not part of a criminal prosecution and the full panoply of rights due a

criminal defendant in such a proceeding thus does not apply. ***State v. King***, 130 Wn.2d 517, 525, 925 P.2d 606, 610 (1996); ***In re Personal Restraint of Whitesel***, 111 Wn.2d 621, 630-31, 763 P.2d 199 (1988); ***In re Personal Restraint of Sinka***, 92 Wn.2d 555, 566, 599 P.2d 1275 (1979). The minimal due process requires "notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." ***Matter of Whitesel***, 111 Wn.2d 621, 630, 763 P.2d 199, 204 (1988), citing ***Sinka***, 92 Wn.2d at 565, citing ***In re Personal Restraint of Hendrickson***, 12 Wn.2d 600, 606, 123 P.2d 322 (1942)(internal quotations omitted).

An appellate court reviews an order setting minimum term for an abuse of discretion. ***In re Personal Restraint of Myers***, 105 Wn.2d 257, 264, 714 P.2d 303 (1986).

a. The hearing setting minimum term complied with RCW 10.95.030(3)(a)(ii) and (b) and satisfied ***Miller***.

In ***Miller***, the United States Supreme Court held that "mandatory life without parole ["LWOP"] for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. The Supreme Court did not categorically prohibit LWOP sentences but rather required that before imposing such sentences, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible

penalty for juveniles." 132 S. Ct. at 2475. Among the factors to be considered are the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468.

RCW 10.95.030(3)(a)(ii) and (b) do not mandate the imposition of a LWOP sentence, although such a sentence is permitted. The court is directed to consider "mitigating factors that account for the diminished culpability of youth as provided in ***Miller***... including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b). The Legislature has properly drafted a statute that complies with the requirements of ***Miller***.

Moreover, that statute was properly followed below. It is clear that the trial judge understood his responsibilities. *See* 3RP 29 ("The statute directs the Court to take into account mitigating factors related to youthful offenders when imposing sanctions"), 3RP 30 ("The statute requires that the Court give due consideration to the juvenile offender's age, their childhood and life experiences, their degree of responsibility that they were capable of exercising and the juvenile's potential for rehabilitation.").

Defendant submitted a large packet of mitigation evidence. CP101-240.[8] There is no argument that the court improperly excluded evidence that he wanted considered or that the court refused to consider relevant mitigation evidence. The record makes it clear that the trial court read all of the information thoroughly and considered its contents carefully. 3RP 34-36, 43-44, 51. After listening to the arguments of counsel, the court issued its decision and explained its reasoning discussing relevant ***Miller*** factors. 3RP 51-55. It was clear that while the court found some mitigation in the information presented, it also found that the defendant's long history of serious offenses in prison left it "extraordinarily doubtful" that any rehabilitation was possible. 3RP 52-55. The court concluded:

> Despite my effort to gain understanding, Mr. Ngoeung, of your brutal and murderous rampage, I am unable to perceive any rational basis for your morally bankrupt and sociopathic behavior. You deserve, in the Court's opinion, to serve every day of the sentence that you have been given.

3RP 55. This record shows compliance with the statute and ***Miller***; it does not show an abuse of discretion. The court's setting of the minimum term on each count of aggravated murder at life should be upheld.

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[8] The State is not convinced that the record below, and therefore, the record on review, contains all of the documents that were considered by the trial court as mitigation evidence. For example, the court stated that it had "read the psychological evaluations of Dr. Whitehill,...Dr. Mayer, and Dr. Galliarti" but those documents are not contained in the mitigation packet. CP 101-240.

As will be addressed below, defendant's arguments that the hearing setting minimum term was faulty are generally based on claims not supported by the record or on erroneous legal assumptions.

b. RCW 10.95.030(3)(a)(ii) and (b) requires that a minimum term be set but does not establish a "presumptive" minimum term.

In his brief, defendant cites to the statutory language of RCW 10.95.030(3)(a)(ii) and (b), then asserts, without argument or explanation, that his "presumptive" sentence was for the minimum term to be set at 25 years. *See* Appellant's Opening brief at p. 25; *see also* Assignment of Error 2 ("the lower court imposed an *exceptional* minimum term")(emphasis added). This differs from the argument defense counsel made to the trial court, acknowledging the court had discretion to impose a minimum term anywhere within the authorized range. *See* 3RP 22, 25. Defendant's argument on review misconstrues the statutory language.

The Legislature clearly knew how to word a statute if it wanted to direct the setting of the minimum term at twenty five years, because it did so when addressing persons under the age of sixteen who committed aggravated murder: "Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five

years." RCW 10.95.030(a)(i). The language governing the setting of minimum terms for persons committing aggravated murder between the ages of sixteen and eighteen is quite different. In that circumstance the legislature stated:

> Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement *of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.*

RCW 10.95.030(3)(a)(ii) (emphasis added). This language sets a floor that the minimum term cannot be set below; this floor is articulated in a manner -"no less than twenty five years" – that is not specific or determinate such that the language could be used by the court. Furthermore, the next sentence indicates that the minimum term *may* be set at "life" or the same point as the maximum term. The Legislature was clearly and unambiguously establishing a range in which the minimum term could be set, namely: "no less than 25 years" to life. Then the Legislature, in the next section, directed the court as to what factors it should consider in setting the minimum term within that range. RCW 10.95.030(3)(b). Defendant's unsupported assertion that RCW 10.95.030(a)(ii) established a "presumptive" minimum term of 25 years is without merit.

c. The prosecutor did not argue or imply that defendant had any burden of proof as to the setting of the minimum term and the court did not employ one.

Defendant argues that because the prosecutor repeatedly stated that "the parties were in court because [defendant] was being given the opportunity to present evidence to *disprove* that he deserved life without parole" that the court erroneously placed this burden onto the defendant. *See* Opening Brief at p. 36, 37-38 (emphasis in original). The citations to the record provided by defendant, 1RP 4, 3RP 4-5, 13-14, do not support his claims about the prosecutor.

The first cite to the record at 1RP 4 pertains to the very first hearing where the court and parties are engaged in preliminary discussions on scheduling. The discussion reflects that the court has another case (the "Phet matter") that is before the court for a similar reason and the court inquires if the matters will be heard at the same time. The prosecutor responds, followed by another question from the court:

> PROSECUTOR: Probably not, Your Honor. It's really dependent upon Counsel for each of these [...]defendants. Some are going to try to present mitigation. I've talked to [defendant's attorneys] on this case, and there is a possibility of an agreed recommendation....
>
> And so there's been discussion between Counsel about whether or not we can have an agreed recommendation for the Court. And, of course, the Court doesn't have to adopt that. But if that's the case, then they wouldn't present essentially mitigating factors under [***Miller***]. But I asked [counsel] to provide a little bit more information about

> some things that are specific to his client in this case before I can even engage in that sort of a dialogue.
>
> COURT: Is there a likelihood that for one or both of these defendants the Court is going to be receiving a presentence information packet of some sort?
>
> PROSECUTOR: I suspect probably. Maybe not on both of those, but just on one of those, I think. Mr. Phet's attorney, I think, has already indicated he wants to –[.]

1RP 3-4. This exchange does not include any discussion of a burden of proof that might be employed in the hearing, but simply discusses whether mitigation evidence will be presented to the court. The record does reflect the prosecutor's expectation that mitigation evidence would be coming from the defense, but that is reasonable assumption as it is the defendant who has the interest in getting such information before the court.

The other support for defendant's claim is equally innocuous. At 3RP 4-5, the prosecutor does no more than to state that the court should "hear any mitigation presented by Mr. Ngoeung." At 3 RP 5-6, the prosecutor articulates that under ***Miller***, before a LWOP sentence can legally be imposed "the judge must have an opportunity to consider mitigating circumstances, if any[.] "

Nor does the prosecutor make statements about any burden of proof to be used in setting minimum term at 3RP 13-14. The prosecutor reiterates that ***Miller*** requires defendant be "provided a meaningful opportunity to show he should be released in his lifetime." 3RP 13. The prosecutor also argues that defendant cannot meet his burden of showing

the ***Miller*** fix legislation unconstitutional because it provides for "a hearing to allow the opportunity to present the mitigating circumstances [so] even if the Court were to impose life without the possibility of parole like the State is asking, that satisfies the concept outlined in ***Miller***[.]" 3RP 14. Never once does the prosecutor argue that the defendant had the burden to disprove that he deserved a LWOP sentence. The only discussion of burdens relates to the burden on the defendant to show the statute unconstitutional. As the prosecutor never made the alleged argument, the court could not have been misled by it as defendant contends. Further, at no time does the court state that it is placing the burden on defendant to disprove that LWOP is the appropriate sentence. Defendant's contention that the prosecutor was arguing this burden or that the court was employing it at the hearing is wholly without factual support in the record below.

d. Neither ***Miller*** nor RCW 10.95.030(3)(b) requires a finding of "irreparable corruption" before a LWOP sentence may be imposed.

At one point in his brief defendant seems to be arguing that the court must make a finding of "irreparable corruption" before it may impose a sentence of LWOP. *See* Opening Brief at p. 23-24, 53. Neither ***Miller*** nor RCW 10.95.030(3)(b) imposes such a requirement.

In ***State v. Ramos***, 189 Wn. App. 431, 357 P.3d 680 (2015), Division III addressed whether ***Miller*** stood for the proposition that a sentence equivalent to life in prison is constitutionally permissible for a juvenile murderer only when there is proof of "irreparable corruption." Division II concluded that there is no such requirement. ***Ramos***, 189 Wn. App. at 450-52.

Division III noted that such an argument was presumably based upon this portion of the ***Miller*** decision:

> [W]e do not consider [the petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." ***Roper***, 543 U.S., at 573, 125 S.Ct. 1183; ***Graham***, 560 U.S., at ——, 130 S.Ct., at 2026–2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Ramos, 189 Wn. App. at 450-51, citing ***Miller***, 132 S. Ct. at 2469. The Court looked at the Unites State's Supreme Court's history of using the phrase "irreparable corruption" when discussing juvenile sentencing. It first appeared in ***Roper v. Simmons***, 543 U.S. 551, 573, 125 S. Ct. 1183,

161 L. Ed. 2d 1 (2005), discussing the difficulty is assessing the juveniles psychological makeup: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In ***Graham v. Florida***, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) this Court repeated this concept noting that a juvenile's character is "not as well formed" which makes assessments about their long term character more difficult. In ***Graham***, the Court was assessing the constitutionality of a life sentence on a juvenile for a non-homicide offense and this discussion of "irreparable corruption occurred in the portion of the opinion where the court was assessing whether the challenged sentencing practice "serves legitimate penological goals." ***Graham***, 560 U.S. at 67-68. Division III reasoned that whether a juvenile is "irreparably corrupt or incorrigible is "relevant to the penological goal of incapacitation, one of the four goals of imprisonment [- the other three being retribution, deterrence and rehabilitation-] that the [United State Supreme] Court has recognized as legitimate." ***Ramos***, 189 Wn. App. at 451. Division III concluded "irreparable corrupt[ion]" is not relevant to retribution or deterrence ***Ramos***, at 451. As the Supreme Court in ***Graham*** reiterated that "choosing among [penological goals] is within a legislature's discretion," it would be contrary to this principle to find a requirement of a factor that had no relevance to two penological goals before a particular sentence

could be imposed. Finally, Division III pointed to the language in ***Miller*** "setting forth what it requires of a sentencer who does make that judgment in a homicide case, it does not say that he or she must find 'irreparable corruption' but only that he or she is 'require[d] ... to take into account how children are different.'" ***Ramos***, 189 Wn. App. at 451-52, citing ***Miller***, 132 S. Ct. at 2456.

Other jurisdictions have reached a similar conclusion as Division III. ***People v. Palafox***, 231 Cal. App. 4th 68, 91, 179 Cal. Rptr. 3d 789, 805 (2014), *review denied* (Feb. 11, 2015), *cert. denied sub nom*, ***Palafox v. California***, 135 S. Ct. 2811, 192 L. Ed. 2d 854 (2015) (***Miller*** decision "mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty" not a finding of irreparable corruption.); ***State v. Lovette***, 758 S.E.2d 399, 408 (N.C. Ct. App. 2014), *appeal dismissed*, 763 S.E.2d 392 (N.C. 2014) (Lovette's argument takes the statement in ***Miller*** "regarding 'irreparable corruption' out of context and seemingly elevates it to a required finding, but this is simply one of the factors a trial court may consider.")

Moreover, nothing in RCW 10.95.030(3)(b) requires a finding that the juvenile is "irreparably corrupt" or any particular finding before a minimum term is set- it only requires the court to examine mitigating factors pertaining to youth and its characteristics before setting the term. To the extent defendant is arguing that LWOP may only be imposed upon

a juvenile if the court find the juvenile to be "irreparably corrupt," he is incorrect.

e. There is a split in authority in the Court of Appeals as to the impact of the Eighth Amendment and ***Miller*** on aggregate sentences for multiple murders; this court should follow the better reasoned decision in ***State v. Ramos***.

Defendant has filed a statement of supplemental authority citing a recent decision from the Court of Appeals, Division I. ***State v. Ronquillo***, ___ Wn. App. ___, 361 P.3d 779 (2015), for the proposition that ***Miller*** applies to aggregate sentences that result in the "functional equivalent" of life without parole. Because ***Ronquillo*** issued after the opening brief was filed, the State does not have the benefit of knowing exactly how defendant will be arguing its relevancy to his review. This seems to connect to argument that defendant makes in his brief addressing the court's decision that the minimum terms on each homicide count would run consecutively. Opening Brief at pp 53-55. Before discussing ***Roquillo***, however, the scope of defendant's argument on review needs to be addressed.

Defendant made two assignments of error that pertain to the trial court's ruling that the minimum term on each count of aggravated murder would run consecutively to the other. *See* Assignment of Error No. 5 and

6, Brief at p. 1. He alleges that this violates the Eighth Amendment as interpreted by ***Miller***. *Id.*; *see also* Opening Brief at pp 53-55. The trial court rejected defendant's contention that the two minimum terms for his two convictions for aggravated murder had to run concurrently or ***Miller*** would be violated. *See* 3RP 27-33. The court examined the issue as a matter of constitutional and statutory construction, and concluded that the terms should run consecutively and that this did not violate the constitution. Defendant has not challenged the court's statutory interpretation, only the constitutional interpretation.

Secondly, it may be unnecessary to reach the question of whether the court erred in its constitutional interpretation of Eighth Amendment protections. ***Miller*** does not preclude the imposition of a LWOP sentence as long as it is not a mandatory sentence and it is imposed after the court has had an opportunity to consider mitigating information relevant to youth. ***Miller***, 132 S. Ct. at 2466, 2469. In this case, after considering defendant's mitigating evidence and the ***Miller*** factors, the court set the minimum term at life on each conviction for aggravated murder. The result is that on each count defendant is serving a LWOP sentence. RCW 10.95.030(3)(a)(ii). If the court set the minimum term properly under the statute and ***Miller***, it makes no difference whether defendant will serve his two terms of LWOP concurrently or consecutively, as the result is the

same. Thus, if the court finds no err in the procedure employed below, it is unnecessary to address this contention.

The State submits that ***Ronquillo*** was wrongly decided and should not be followed by this court ; instead the court should follow Division III in ***State v. Ramos***, 189 Wn. App. 431, 357 P.3d 680 (2015).

In ***Roquillo***, Division I held that the principles announced in ***Miller*** also applied to aggregate sentences imposed on a juvenile offender that were de facto life sentences. 361 P.3d at 784-85. Ronquillo was before the court for sentencing on one count of first degree murder, two counts of attempted first degree murder and one count of second degree assault while armed with a firearm. *Id.* at 781. He alleged that as the bottom end of his standard range sentence for all crimes resulted in total confinement of more than 51 years, that this was a *de facto* life sentence and that ***Miller*** applied to his sentencing. *Id.* at 783-84. The State argued that ***Miller*** dealt with a single sentence for a single crime and that the Eighth Amendment was not implicated by separate sentences for separate crimes. *Id.*, at 784. The State relied on three cases -from Arizona, Florida and the Sixth Circuit - all dealing with sentencing a juvenile on multiple crimes to support this proposition, but Division I did not find this authority persuasive. *Id.* at 784-85. Division I agreed with Ronquillo that the

Miller decision applied to cases with de facto life sentences, finding decisions from Iowa, and Wyoming persuasive. *Id.* at 785.

Missing from the analysis in ***Roquillo*** is that Eighth Amendment analysis has traditionally performed on each individual sentence for each crime rather than the aggregate sentence. ***United States v. Schell***, 692 F.2d 672 (10th Cir.1982), ***United States v. Aiello***, 864 F.2d 257 (2d Cir.1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); ***Pearson v. Ramos***, 237 F.3d 881 (7th Cir.2001)) ("in any rate it is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim."); ***Close v. People***, 48 P.3d 528 (Colo.2002); ***People v. Gay***, 960 N.E.2d 1272, 1279 (2011), *cert. denied*, 133 S. Ct. 270 (2012) ("The eighth amendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the duration of sentences he has already accrued."). As the Supreme Court of Iowa wrote, "There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only *one* crime, which is the effect of consecutive sentencing." ***State v. August***, 589 N.W.2d 740, 744 (Iowa 1999) (emphasis in original). Likewise, the Arizona Supreme Court concluded that "if the sentence for a

particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." ***State v. Berger***, 212 Ariz. 473, 479, 134 P.3d 378, 384 (Ariz 2006) (mandatory consecutive sentences amounting to 200 years imprisonment for 20 counts of possession of child pornography was not cruel or unusual). As the United States Supreme Court once pointed out, "[i]f [the defendant] has subjected himself to a severe penalty, it is simply because he has committed a great many such offences," ***O'Neil v. Vermont***, 144 U.S. 323, 331, 12 S. Ct. 693, 696, 36 L. Ed. 450 (1892) (quoting ***State v. Four Jugs of Intoxicating Liquor***, 58 Vt. 140, 2 A. 586 (1886)).

Division I did not explain why these long standing principles of Eighth Amendment jurisprudence would become invalidated by ***Miller***, particularly when nothing in that decision calls these principles into question. The Court in ***Miller*** was faced with juveniles that had been convicted of a single count of murder. Even then the court allowed that a LWOP sentence could be imposed, it just could not be mandatory. ***Miller***, 132 S. Ct. at 2466, 2469.

Division III of the Court of Appeals reached a different conclusion when presented with many of the same arguments. ***State v. Ramos***, 189 Wn. App. 431, 357 P.3d 680 (2015). Ramos was before the court for

sentencing on three counts of felony murder and one count of premeditated murder; he argued that a sentence equivalent to a life sentence was constitutionally impermissible under ***Miller***. *Id.* at 434. The Court of Appeals, Division III, rejected this argument pointing out that the two juveniles before the court in ***Miller*** had each received a mandatory sentence of life without parole for a single murder, whereas Ramos was before the court for sentencing on three counts of felony murder and one count of premeditated murder, *Id.* at 450. It held that "***Miller*** does not apply, by its terms, to his sentence." *Id.* Later in the decision the court went on to reject Ramos's arguments that because the presumptive standard range sentence on his multiple crimes was equivalent to a life sentence that it was unconstitutional. *Id.* at 693. Division III rejected these arguments, again noting that Ramos was before the court for sentencing on four murder convictions and the length of his presumptive sentence was due to the number of his crimes. It stated:

> None of the United State Supreme Court's precedents under the Eighth Amendment suggest that consecutive sentencing for multiple murders constitutes cruel and unusual punishment.

Id. at 458.

Other than ***Ronquillo***, defendant has not cited to a single Washington case where an appellate court has applied Eighth Amendment

analysis to aggregate sentences as opposed to a sentence imposed for a single crime. In ***Ramos***, Division II looked at ***Miller*** and examined what it said against a backdrop of existing Eighth Amendment jurisprudence and concluded it did not apply to aggregate sentences. In ***Ronquillo***, Division I looked at ***Miller*** and ignored all other Eighth Amendment jurisprudence. But neither Ramos nor Ronquillo were being sentenced on aggravated murder. Neither of them could be sentenced to LWOP on any one of their crimes. In that respect both cases are inapposite to defendant's situation.

In this case the defendant had a hearing pursuant to RCW 10.95.030 for the court to set a minimum term on each of his two convictions for aggravated murder in the first degree. Under ***Miller***, the court was not precluded from setting the minimum term at LWOP on each count of murder if it determined that was the appropriate term following hearing where it considered any relevant mitigating evidence under the ***Miller*** factors. The court properly engaged in such a hearing and determined that "life" was the appropriate minimum term. Defendant has made no showing that either of his minimum terms violate the Eighth Amendment. If LWOP may be imposed on a single count of aggravated murder, then LWOP for two aggravated murders will not violate the Eighth Amendment. As Division II stated it:

> We cannot accept the proposition that a sentencing scheme that is valid under the Eighth Amendment for a juvenile offender who commits a single murder is invalid if an offender commits enough murders that, run consecutively, the sentences approach a lifetime. Youth matters. But so do the lives that were taken.

Ramos, 189 Wn. App. at 458.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN UNDER ***STRICKLAND*** OF SHOWING DEFICIENT PERFORMANCE AND RESULTING PREJUDICE TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. To establish ineffective assistance, a defendant must show that (1) the performance of counsel was so deficient that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. ***State v. McFarland***, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to make either showing terminates review of the claim. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Review of counsel's performance begins with a strong presumption that it was effective. ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); ***State v. Grier***, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "[T]he proper

standard for attorney performance is that of reasonably effective assistance." ***Strickland***, 466 U.S. at 687.

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. ***State v.***

Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant' primary argument is that defense counsel did not argue strenuously enough for a sentence of less than life. The record shows that counsel chose to rest on the submitted materials noting that they were "quite lengthy" and "pretty comprehensive." 3RP 34-35. The court assured defense counsel that it had read all of the material submitted. RP 35. Nor did defense counsel make many arguments after the prosecutor's arguments. 3RP 48-49. Defendant argues that the failure to do so allowed the prosecutors arguments to hold improper sway with the judge. But the court interjected several times while the prosecutor was arguing demonstrating that it was not just blindly accepting the prosecutor's arguments. When the prosecutor argued that defendant's brain development shouldn't be much a mitigating factor because he was just 51 days shy of his 18th birthday, the court stated:

> I'm not sure that the current science indicates that the development of the adolescent brain is complete at the age of 18, as if that is some magic landmark. In fact, the science that I am familiar with would indicate that this continues into the 20s. ...I think that Miller requires the Court to drill down deeper and determine what were the motivational or other factors that resulted in such a sociopathic response to nothing.

3RP 39 -40. The court's interjections to when the prosecutor was arguing about whether the defendant's upbringing should be given weight in mitigation showed that it was disagreeing with the prosecutor's assessment. The court noted that the "[alcoholic] father left home when he was 12" leaving him with a mother who "spoke marginal English" and that the court did not see this as "a welcoming, embracing family." 3RP 42. The court also noted that defendant was apparently allowed to drop out of school at the age of ten when his parents should have been insisting that he attend. 3RP 44. Thus, it was apparent to the defense counsel that just because the prosecutor made an argument, the court was not being swayed blindly by it. Not surprisingly, the court was exercising its own assessment of the materials that had been submitted in mitigation, as that is an essential judicial function and most lawyers would expect a court to do.

Defendant is also highly critical that his attorneys did not address the nature of the offense and argue that as defendant was only an "accomplice" that his culpability was lessened. The mitigation packet did include information about the nature of the offense and but stated that it could be "explained, at least in part, by an examination of the conditions under which [defendant] was raised, the magnitude of environmental and social stressors endured" in his life. CP 106-07. The defense sentencing

memorandum also included some basic facts about the crime, but did not argue the facts of the crime weighed in favor of mitigation. CP 243-265. Defendant fails to show that this was not a tactical decision by his counsel below, as focusing on the nature of the crime would focus on considerable unfavorable information about the defendant. This is a crime where, in response to four boys in a car throwing eggs at houses, defendant and two friends hopped into a car armed with a rifle and went in pursuit of the egg throwers, because they viewed the egg throwing as a showing of disrespect that could not be ignored. These are not good facts to spotlight.

Defendant argues that his attorney should have argued that as an accomplice he was less culpable. Accomplice liability does not always equate to less culpability for if an offense is committed by two principals, each will be an "accomplice" to the other. Defendant was not the shooter, but he was the driver of the car from which the shots were fired. CP 268-295. Defendant got behind the wheel of that car knowing that one of his friends getting into the same car was armed with a rifle and stating something to the effect that he "was going to go get them." *Id.* Defendant put on his high beams and followed the car with the victims closely. The evidence showed the victim car tried to unsuccessfully evade the car that defendant was driving. *Id.* Defendant pulled his car up beside the victim's car and matched its speed. *Id.* Multiple shots were fired at the

victim car by the shooter in defendant's car, but defendant did not brake, stop his pursuit, or try to interfere with the shooter. Moreover, there was evidence adduced at trial that this was the second time that defendant had been driving a car involved in a drive-by shooting where he had driven his car in a similar manner. *Id.* The court could easily conclude that defendant was a much a principal in this crime as the shooter; he certainly was not a minor participant.

The facts of this crime do not show 'transient rashness," the "inability to assess risk" or the "proclivity for risk" typical of teenagers. Defendant had participated in a prior drive –by shooting and understood what was about to occur. There is nothing that shows defendant was unable to assess the risk of repeatedly firing a rifle into a car at close range that was occupied by four persons. Defendant was not playing "chicken" with the victim car or engaged in drag racing, which might show a "proclivity for risk," he was pursuing a car for revenge and maneuvering his car so that the shooter would have a good shot at the occupants.

Additionally, while defendant was under the age of 18 at the time of the crime, he was the eldest of the three co-defendants; the shooter, O.I., was 15 at the time of the crime and the person in the back seat of defendant's car, S.M., was 13 years old. CP 107. In many eyes, this fact would make defendant the *most* culpable of the three co-defendants. Nor

was there any evidence that his participation was the result of peer pressure. O.I. had to tell the 13 year old S.M. to get in the car, but not defendant. CP 268-295.

The record shows that the court found the crime was "unimaginably horrible" and that defendant participated in a "brutal and murderous rampage." 3RP 39, 55. Even defendant's appellate counsel acknowledges that defendant's crimes are "exactly the type most likely to invoke the most fear and loathing in the community and the courts." Opening Brief at p. 48. While the mitigation packet did not ignore the facts of the crime, there was a solid tactical reason for defense counsel not to focus on the facts of the crime at the hearing to set minimum term. Defendant fails to meet his burden of showing that manner in which defense counsel chose to address the facts of the crime constituted deficient performance.

The court considered at least three past psychological examinations of defendant and his psychological records from the department of corrections. 3RP 53; CP 101-240.[9] Defense counsel also hired a psychiatrist, Dr. Lee, to prepare a new report assessing defendant's "psychological and neurodevelopmental functioning" as those factors

[9] *See* note 6, *supra.*

were relevant to sentencing. CP 130-134. This evaluation, as well as other materials included in the mitigation packet, cited or commented on research on the adolescent brain. CP 101-134. Dr. Lee's report spoke about such research as it pertained to defendant's situation and concluded that defendant's "levels of cognitive and psychosocial functioning at the time of the instant offense were qualitatively different from those of an adult." CP 133. Defendant now seems to fault his trial counsel for not directing the court to publications of general studies and research into adolescent brain development. The record shows his attorney retained an expert who could apply such general studies to the defendant's specific situation. There is no reason to think that the trial court would be more convinced or swayed by citations to studies and research about juveniles, in general, than it would be by specific information about the defendant presented by an expert, who would be familiar with such studies. Defendant has not shown that Dr. Lee was unqualified and, therefore, cannot show that defense counsel's decision to retain him to get psychological information before the court constituted deficient performance.

Additionally, the court did not have a seventeen year defendant before it, but a 38 year old man. The court noted the difficulty in trying to consider the ***Miller*** factors, particularly the potential for rehabilitation,

under such circumstances. 3RP 46, 54. The court finally concluded that the court had to look at defendant's potential for rehabilitation at the present time, not what it used to be when he was seventeen. 3RP 54. Consequently, research about the adolescent brain and its capacity to change was less relevant on the "potential for rehabilitation" factor, because the court was imposing a minimum term on a middle-aged man and not a seventeen year old.

Finally, defendant cannot show resulting prejudice. The record shows that the trial court understood its responsibilities under RCW 10.95.030 and ***Miller*** and that it carefully considered all of the materials given it by the parties. The court asked many questions during the course of the hearing. The record below shows an attentive court seeking to properly apply the law and weigh the ***Miller*** factors. The record does not show a court that was unprepared and relying upon the content of oral argument for its information. As such, the content of defense counsel's oral presentation, or lack thereof, would have no effect on the outcome of the proceeding. Defendant's ineffective assistance of counsel claim is without merit.

D. CONCLUSION.

The proper method of seeking review of the setting of a minimum term under RCW 10.95.035 is by personal restraint petition. Defendant has failed to show that his restraint is unlawful under RAP 16.4(c). Defendant has not shown that RCW 10.95.030(3)(a)(ii) and (b) is unconstitutional on its face. Nor has he shown any error in how his hearing pursuant to these provisions was conducted or that the trial court abused its discretion in setting the minimum term at "life" on his two convictions for aggravated murder. Finally defendant has failed to show that his counsel was ineffective. The petition should be dismissed.

DATED: FEBRUARY 1, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/1/16
Date Signature

APPENDIX "A"

RCW 10.95.030

West's Revised Code of Washington Annotated
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.95. Capital Punishment--Aggravated First Degree Murder (Refs & Annos)

West's RCWA 10.95.030

10.95.030. Sentences for aggravated first degree murder

Effective: April 29, 2015
Currentness

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(c) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under *RCW 9.94A.728(3).

(d) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(e) No later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(f) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department of corrections shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(g) In a hearing conducted under (f) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be provided by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(h) An offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board. The department shall monitor the offender's compliance with conditions of community custody imposed by the court or board and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(i) An offender released or discharged under this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community custody. The offender is entitled to a hearing pursuant to RCW 9.95.435. The board shall set a new minimum term of incarceration not to exceed five years.

Credits

[2015 c 134 § 5, eff. April 29, 2015; 2014 c 130 § 9, eff. June 1, 2014; 2010 c 94 § 3, eff. June 10, 2010; 1993 c 479 § 1; 1981 c 138 § 3.]

West's RCWA 10.95.030, WA ST 10.95.030
Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

APPENDIX "B"

RCW 10.95.035

West's Revised Code of Washington Annotated
Title 10. Criminal Procedure (Refs & Annos)
Chapter 10.95. Capital Punishment--Aggravated First Degree Murder (Refs & Annos)

West's RCWA 10.95.035

10.95.035. Return of persons to sentencing court if sentenced prior to June 1, 2014, under this chapter or any prior law, for a term of life without the possibility of parole for an offense committed prior to eighteenth birthday

Effective: April 29, 2015
Currentness

(1) A person, who was sentenced prior to June 1, 2014, under this chapter or any prior law, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with RCW 10.95.030. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW 10.95.030.

(2) The court shall provide an opportunity for victims and survivors of victims of any crimes for which the offender has been convicted to present a statement personally or by representation.

(3) The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.

(4) A resentencing under this section shall not reopen the defendant's conviction to challenges that would otherwise be barred by RCW 10.73.090, 10.73.100, 10.73.140, or other procedural barriers.

Credits
[2015 c 134 § 7, eff. April 29, 2015; 2014 c 130 § 11, eff. June 1, 2014.]

West's RCWA 10.95.035, WA ST 10.95.035
Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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PIERCE COUNTY PROSECUTOR

February 01, 2016 - 3:01 PM

Transmittal Letter

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Case Name: State v. Nga Ngoeung
Court of Appeals Case Number: 47157-4

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